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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1052

GROENDYKE TRANSPORT, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

GROENDYKE TRANSPORT, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

(CONSOLIDATED CASES)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above en-

titled consolidated cases, enforcing an order of the National Labor Relations Board in Case Number 8571, and dismissing petitioner's petition for a review of an order of the National Labor Relations Board in Case Number 150-69.

CITATIONS TO OPINIONS BELOW

The Board's decision and order in Case No. 8571 are reported in 164 N.L.R.B. No. 28, 65 LRRM 1067. See Appendix A, page A1. The Board's decision in Case No. 150-69 is unreported but is set out in Appendix B, page A5. The opinion of the United States Circuit Court of Appeals for the Tenth Circuit is reported in 417 F.2d 33 and is set out in Appendix C, page A7. The judgment of the United States Circuit Court of Appeals for the Tenth Circuit is set out in Appendix D, page A12.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 13, 1969. Petitioner's petition for rehearing was denied on November 25, 1969. Petitioner's motion to stay the mandate, pursuant to Rule 41(b) of the F.R.A.P. was sustained on December 10, 1969, granting petitioner 30 days to make application to this court for a writ of certiorari. The jurisdiction of this court is invoked under the provisions of Title 28, U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether on remand the Board properly determined that a single unit of truck drivers working out of respondent's Denver, Colorado, terminal was appropriate for the purpose of collective bargaining.

2. Whether the Board properly determined that respondent's terminal manager had authority to resolve issues which would be the subject of collective bargaining.

3. Whether the Board's certification of a union majority made on September 2, 1964, created a presumption of law as to its continuance forever or only for a reasonable length of time.

4. Whether the court in the exercise of its equity powers, should issue a mandatory injunction based on data over five years old.

5. Whether the Board has complied with the Administrative Procedure Act in the conduct of these proceedings.

STATUTORY PROVISIONS INVOLVED

The applicable statutory provisions involved in these proceedings are as follows: Title 29, U.S.C.A., §158, Appendix E, page A13; Title 29, U.S.C.A. §159(a), Appendix F, page A14; Title 29, U.S.C.A. §159(c), Appendix G, page A14; Title 29, U.S.C.A. §159(c)(B), Appendix H, page A14; Title 29, U.S.C.A. §160(b), Appendix I, page A15, of the National Labor Relations Act, 61 Stat. 136 (1947) as amended; and Title 5, U.S.C.A. §552, Appendix J, page A15, of the Administrative Procedure Act, 60 Stat. 238.

STATEMENT OF CASE

In the initial hearing on this case, the United States Court of Appeals for the Tenth Circuit denied enforcement of the Board's order, remanding the case to the Board with instructions to "articulate the reasons for its apparently inconsistent findings in the two cases involving the operations of the same employer." *National Labor Relations Board* v. *Groendyke Transport, Inc.*, 372 F.2d 137, 10th Cir. 1967; cert. denied 387 U.S. 932, 87 S.Ct. 2054, ... L.Ed.2d .....

The Board issued its supplemental decision on April 28, 1967, without a further hearing, reaffirming its original decision to the effect that a single terminal of petitioner's integrated transportation company was appropriate for the purpose of collective bargaining. 164 N.L.R.B. No. 28, Appendix A, page A1.

The Board took no action to enforce the foregoing order until this proceeding was filed on November 18, 1968.

On December 24, 1968, petitioner filed a petition for decertification, Appendix K, page A16, pursuant to Title 29, U.S.C.A., §159(c)(B), alleging that a substantial number of petitioner's employees had asserted that Teamsters Local 961, Denver, Colorado, was no longer their representative. The petition was supported by four exhibits indicating four successive petitions for decertification had been filed by petitioner's employees but all had been dismissed without a hearing by the Board. In a similar fashion, the Board dismissed petitioner's petition for decertification, Appendix B, page A5, Case No. 150-69. The petitioner then filed a petition to review and such petition was dismissed by the Court of Appeals, Appendix L, page A18.

The United States Court of Appeals consolidated the unfair labor practice proceeding with the case involving petitioner's petition for decertification.

Following the filing of briefs, and oral argument, the United States Court of Appeals found generally that the Board's findings afforded a rational basis for distinguishing the Board's prior proceeding involving the same employer. In the decertification proceeding, the court sustained the Board's "policy" against entertaining a 9(c) petition while an unfair labor practice proceeding was pending against an employer. Petitioner's petition for review was accordingly dismissed.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Tenth Circuit is in conflict with the following circuit court decisions:

NLRB v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895 (7 Cir. 1966);

NLRB v. *Purity Food Stores, Inc.*, 376 F.2d 497 (1 Cir. 1967), cert. denied 389 U.S. 959, 88 S.Ct. 337, ... L.Ed.2d .....;

NLRB v. *Davis Cafeteria, Inc.*, 396 F.2d 18 (5 Cir. 1968);

NLRB v. *Solis Theatre Corp.*, 403 F.2d 381 (2 Cir. 1968);

NLRB v. *Harry T. Campbell Sons Corp.*, 407 F.2d 969 (4 Cir. 1969).

In the foregoing decisions, the courts could see "no rational basis for fractionating the respondent's organization for purposes of collective bargaining." *NLRB* v. *Purity Foods Stores, Inc.*, supra.

ARGUMENT AND AUTHORITIES

The Court of Appeals referred to this proceeding as a "typical cease and desist and bargain upon request order". Petitioner respectfully submits that this case involves issues of law and fact of first impression. This is the first appellate decision that has approved the National Labor Relations reversal of policy with respect to integrated transportation companys announced in *Fredrickson Motor Express Corporation*, 121 NLRB 32. In other cases where the Board has announced a change of policy, it has set forth its reasons. See *Quaker City Life Insurance Company*, 134 NLRB 960. The Board has made no attempt whatever to explain its change of policy in *Fredrickson*.

This case will be cited nationwide as authority supporting the Board's "post hoc" rationalization that a single terminal of an integrated transportation company operating under the regulation of the Interstate Commerce Commission, is presumptively an appropriate unit. The court's opinion further stands as authority for the proposition that the Board need not determine what effect *piecemeal unionization* will have on the employer's business nor what effect it will have on the rights of the employees desiring to refrain from collective bargaining.

In the prior proceeding before the Court of Appeals, it was stated:

> "In the first proceeding a three terminal unit was deemed to be inappropriate. The Board now finds that one terminal is appropriate. In the prior proceeding it apparently could find no local autonomy. In the present proceedings, it finds local autonomy with supervisory powers in the terminal manager - - -. These factors are of course distinctly relevant to the question of appropriateness and *some reconciliation is in order.*"
>
> *NLRB* v. *Groendyke Transport, Inc.*, 372 F.2d 137 (1967).

The court, in the present proceeding, finds "the single terminal unit avoids the wide geographic separation existing in the 1951 proceedings - - - and the *Denver terminal manager has substantial authority in matters of daily concern to the drivers.*" In the 1951 proceeding, the Board found:

> "Although each of its terminals is supervised by a local manager, each of these managers is directly responsible to the employer's traffic manager who is stationed at its principal offices in Enid, Oklahoma - - -. They (terminals) - - - do not correspond to any functional or administrative division of the employer's operations."

Petitioner submits that the present management of its business has been unchanged since 1951. Yet the Board and the Court of Appeals have found that the authority of the terminal manager has been apparently expanded and enlarged to cover "*substantial authority in matters of daily concern to the drivers,*" without describing such matters of daily concern to the drivers. Petitioner submits the evidence of record does not support such a finding.

Whereas the Court of Appeals did review this case in depth on the initial hearing, the Court appears to have accepted the Board's rationalization on remand without applying the judicial criteria set forth in *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, supra; *NLRB* v. *Purity Food Stores, Inc.*, supra, and *NLRB* v. *Davis Cafeteria, Inc.*, supra.

> "This is not to say, however, that courts have no role to play in the area of unit determination. The Act does provide for judicial review of the Board's decisions, including unit determinations, before enforcement.
>
> * * *
>
> "And, when the Board in its unit determinations has relied too heavily on extent of organization, failed to articulate substantial reasons to support its decision, or acted in a way so inconsistent with the Board's own decisions as to suggest arbitrariness, the Court of Appeals particularly in the last four years, have not shrunk from their duty to refuse enforcement.
>
> * * *
>
> "We are unable to say that there are substantial reasons apart from extent of organization to justify the Board's action.
>
> Enforcement denied."

Local 1325 Retail Clerks v. *NLRB*, 71 LRRM 2721, 414 F.2d 1194, July 2, 1969 (U.S. Court of Appeals D.C.).

1.

The Board Was Guilty of an Abuse of Discretion in Determining That a Single Terminal in an Integrated Transportation Company Was an Appropriate Bargaining Unit.

On remand of this case, the Board had the duty to review the appropriate unit issue pursuant to the guideline set down in the court's opinion. The Board's duty in such cases has been described as follows:

> "When the case was directed to be remanded to the Commission for such further proceedings as might be appropriate, it was with the thought that the Commission would give full effect to its duties in harmony with the views we had expressed. *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, 59 S.Ct. 301, 83 L.Ed. 221, *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166. *This obviously meant something more than the entry of a perfunctory order - - -. After the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress.*"
>
> *Securities Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995.

In the Board's original opinion, the following findings were made:

> "The Enid, Oklahoma, terminal is the employer's home office and serves as the *bookkeeping and management headquarters.* - - - The Denver terminal is geographically separated from the employer's main terminal and indeed from all the employer's other terminals by substantial distances, the nearest terminal being located at LaJunta, Colorado, approximately 180 miles distant. The record discloses also that there is at most only occasional interchange of drivers to and from the Denver terminal, and that

> *to a certain degree, there is local supervision of the drivers and indeed local autonomy in the conduct of its day to day operation.* In view of the above, I find that the unit sought by petitioner, limited to drivers at the employer's Denver terminal, is also appropriate. I am compelled to this conclusion by the above factors *and additionally because there is no bargaining history for any of the employer's employees and no labor organization seeks a broader unit."* (A-127, 128).

The foregoing findings made no reference to the prior Board decision in *Groendyke Transport, Inc.*, 92 NLRB 1332, where the operations of respondent were examined in detail. The Court of Appeals held that the integrity of the administrative process required the Board to reconcile its inconsistent findings.

> "We think the Board's prior decision involving this respondent's operations upon which the very issue of appropriateness was made to depend was distinctly relevant to the consideration of the appropriateness of this unit. In the first proceeding a three-terminal unit was deemed to be inappropriate. The Board now finds that one terminal is appropriate. In the prior proceedings, it apparently could find no local autonomy. In the present proceeding it finds local autonomy - - -."
>
> *NLRB* v. *Groendyke Transport, Inc.*, 372 F.2d 137 (1967), 10th Cir. 1967, cert. denied 387 U.S. 932, 87 S.Ct. 2054, ... L.Ed.2d .....

The Board, instead of reviewing this matter afresh, has simply redrafted its findings, rationalizing its findings to conform with its original opinion in this proceeding. On remand, the Board concluded as follows:

> "The factors that militated against the three-terminal grouping which the Board found inappropriate in its previous decision are not present with respect to the single terminal unit sought here. The single terminal

unit avoids the problem of wide geographical separation and corresponds with the respondent's only operational subdivision since there are no intermediate levels of authority between the terminal and central office." (Supplemental Decision, Appendix A, page A3).

The Board's opinion departs from the following Board precedents without explanation:

Rutherford Freight Lines, 59 NLRB 343;

Baggett Transportation, Inc., 85 NLRB 1093;

Central Greyhound Lines, 88 NLRB 13;

Southern Truck Lines, 107 NLRB 615;

Helms Motor Express, Inc., 107 NLRB 132;

The Transportation Company of Texas, 111 NLRB 884;

Safeway Trails, Inc., 120 NLRB 79;

Baggett Transportation, Inc., 123 NLRB 1706.

The Board, in its opinion, cites *Frederickson Motor Express Corp.*, 121 NLRB 32, as authority for its decision in this proceeding. *Frederickson* cannot be reconciled with *Baggett*. Further, no circuit court of appeals has reviewed the Board's action in *Frederickson*.

As recently as 1963, the Board declared that "*the* appropriate bargaining unit in retail chain operations should embrace the employees of all stores within an employer's *administrative* or geographical area." *Weis Markets, Inc.*, 142 NLRB 708; and again in 1969 in *Frankel Shops, Inc.*, 70 LRRM 1194.

"This appears to me to be nothing less than a return to the heretofore unacceptable and outlawed practice of establishing provisional units which were admittedly based on the extent of organization and a circumvention of the express prohibition of the statute under the guise of policy change. To require the

company to bargain separately with a representative of the employees in each district office, as organization of each small unit may succeed, can result in nothing but confusion and turmoil."

J. Boreman (dissenting in part) in *NLRB* v. *Quaker City Life Insurance Co.*, 319 F.2d 690.

2.

Respondent's Terminal Manager Did Not Have Authority to Resolve Issues Which Would Be the Subject of Collective Bargaining.

The Board's Supplemental Decision rendered in this case proceeds from an erroneous premise, namely, that the management of respondent's single terminal was analogous to the single manufacturing plant, citing *Dixie Belle Mills, Inc.*, 139 NLRB 629. The Board's decision is to be noted for its brevity and failure to consider the basic subjects of collective bargaining, such as wages, hours, seniority, etc. Respondent's terminal manager obviously had no authority over such matters.

In *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, supra, it was observed:

"The only factual contention made by petitioner which requires notice is that each restaurant has 'autonomy' because each restaurant manager has certain powers. However, the undisputed facts appearing in the record show that a common labor policy affecting all employees is formulated and administered by the president, as chief executive, and certain other officers of the corporations. Reporting to him are three area supervisors each of whom has a share of the Indianapolis restaurants to cover. These area supervisors visit the restaurants frequently. The managers' duties include the telephoning to local suppliers who have been selected and have entered into agreements

negotiated by the president. The managers receive supplies and forward invoices and cash sales records to the general office each day."

* * *

"It is obvious to us that none of the store managers will be deciding questions affecting the employees in the context of collective bargaining."

Similarly, in *NLRB* v. *Purity Food Stores, Inc.*, supra, it was held:

"But the court was dissatisfied with the Board's determination that only the Peabody store in the respondent's supermarket chain constituted an appropriate collective bargaining unit. Wherefore the court declined to enforce the Board's order to bargain collectively as required by §8(a)(5) of the Act and remanded to the Board for further proceedings. *NLRB* v. *Purity Food Stores, Inc.*, 354 F.2d 926 (C.A. 1, 1965). *The Board, in spite of this court's statement that 'in our opinion it would be difficult to find a more integrated operation or less difference among employees,' nevertheless, in a supplemental decision and order, reaffirmed its previous determination that the respondent's Peabody Store constituted an appropriate collective bargaining unit and has again petitioned for enforcement."*

* * *

"The Board rested its conclusion basically on lack of storewide bargaining history and on its view that the Peabody store was so economically independent of the other retail stores and possessed such 'significant autonomy' within the respondent's over-all operation, that separation of that store from the others for purposes of collective bargaining would not obstruct centralized control and effective operation of the chain. We cannot agree."

In *NLRB* v. *Davis Cafeteria, Inc.*, supra, the court held:

> *"In the circumstances of this case, labor policy is centrally determined, and where local managers do not have authority to decide questions which would be subjects of collective bargaining, the two respondent cafeterias do not constitute an appropriate bargaining unit."*

The authority of petitioner's terminal manager is contained in the following testimony (summarized):

> "I have a petty cash fund that is furnished by Enid which I advance to the drivers (A-115). We go along a lot of times for a month maybe without any advances. I recall an incident where some friends of a driver were taking some gasoline out of a transport (A-116). I conferred by telephone with the home office (at Enid, Oklahoma) and naturally the driver was terminated (A-116). I had investigated the matter before I telephoned Enid. I told him what happened A-116). It was necessary for me to go down to the Durango area to interview drivers. With a telephone to Enid, Oklahoma, and with special permission, we hired a driver and he was put to work until his papers could have gotten into Enid because time was of the essence (A-117). I called them before I went as to what I would need to do. (A-117)."

Testimony of Jess Seals continued as follows:

> "All grievances are handled at Enid (A-119). An example of the type of grievances that have arisen in the Denver terminal would be where one of our own people or one of various insurance carriers would write up an observation report and mail it direct to Enid (A-119). Monetary discipline is assessed and handled at Enid (A-119). If a driver he was short changed on a particular payroll period he would first call it to my attention. I would then call Enid and that would be then Enid from now on (A-119). I have reprimanded drivers under circumstances involving gross negli-

> gence, company rules and policies (A-120). If a driver did not keep his logs up to date, we just simply hang it back on his hook. I have received complaints from customers about particular drivers. I call them in and say let's try to do a little better (A-120). If a driver goes out and has a wreck, the report goes in. Enid doesn't ask me if that driver is to be discharged. They discharge him (A-121). I normally discuss a wreck with a driver to find out what happened. All this you would have to have down to get this into Enid because if we are one day late, well we better have it down there (A-121). The driver furnishes the information to prepare a report to forward to Enid (A-121)."

The testimony of respondent's president, A. L. Hamilton (A-23 to A-47), and respondent's vice president, McKennon (A-122 to A-123), reveal no serious discrepancies in testimony concerning the real and apparent authority of respondent's terminal manager.

The subjects of collective bargaining are varied but in a typical Teamsters' contract, the following subjects are covered:

> "Hiring hall provisions, check off, union shop, recognition of union's jurisdiction rules, recognition of job stewards, provisions for processing grievances, leaves of absence, seniority, dispatch provisions, reduction in force, discharge and suspension complaints regarding equipment, accident reports, health, welfare and pension funds, rates of pay, hours of employment, holiday and vacation pay, breakdown pay, layover pay, deadheading, loading and unloading time, and picketing."

It cannot be seriously argued that respondent's terminal manager has any authority to resolve issues relating to the foregoing subjects of collective bargaining. All authority over these subjects is retained by the respond-

ent's central office at Enid, Oklahoma. At most, respondent's terminal manager has been assigned various ministerial duties in carrying out the labor policies established by respondent's central office.

The court has only to examine a typical Teamster contract to determine the chaotic effect of piecemeal union organization on this employer. For example, in the seniority section, provisions can be found for permitting an employee to exercise his seniority at terminals other than his home terminal. Thus, where only one terminal was unionized, a union employee would have the privilege of displacing a non-union employee at a non-union terminal. Such contracts further contain dispatch provisions which are based on seniority. A typical provision states that drivers from foreign terminals shall be dispatched ahead of home domiciled drivers only in the general direction of their home terminal. The result would be utter confusion in that the respondent's present terminals do not employ seniority provisions in its dispatch procedure.

As to picket lines, the typical contract permits the union driver to honor all picket lines without fear of discharge. We would thus have the situation where a union terminal driver would refuse to cross a picket line established at the respondent's non-union terminal for the purpose of making a delivery or picking up a load.

As a further catch-all provision, the typical agreement states that it applies to all "accretions to the bargaining unit including but not limited to newly established, acquired or consolidated terminals." Thus the stage is set for the union's claim on all new terminals.

The court is urged to observe the realities of this situation. If the respondent's integrated business can be fragmentized into small units, those same units can then

be manipulated to obstruct the operations of the system-wide unit. The rights of the employees of the system-wide unit to refrain from collective bargaining will then have been seriously impaired, if not destroyed.

3.

The Board's Certification May Have Created a Presumption of a Union Majority but Such Presumption Does Not Exist Forever.

The respondent in this case made an offer of proof to the Board upon remand, that the union no longer had a majority at its Denver, Colorado, terminal. This offer of proof was rejected as was respondent's demand for an additional hearing on remand. In a similar case, it was held:

> "As pointed out heretofore, this and other courts have held that where a majority is shown, there is a presumption of its continuance in the absence of proof to the contrary, but we are of the opinion that such presumption continues for a reasonable time only. Certainly there is no presumption that it continues forever, and we think that it does not continue for as long as 3 years, especially in face of an assertion and offer of proof to the contrary.
>
> "It appears reasonable to us, in view of the circumstances, in order to properly safeguard the rights of the interested parties, that the Board conduct an election for the purpose of determining whether the Union in question now represents a majority, in the appropriate unit, of petitioner's employees. Our order in this respect will, therefore, be conditional upon such ascertainment. We think our authority to impose such a requirement is found in *NLRB* v. *Fansteel Corp.*, supra, 306 U.S. 262, 59 S.Ct. 498, 83 L.Ed. 627, 123 A.L.R. 599, and in *NLRB* v. *National Licorice Co.*, 60 S.Ct.

569, 84 L.Ed. 799, decided Mar. 4, 1940, affirming 2 Cir., 104 F.2d 655."

Stewart Die Casting Corp. v. *NLRB*, 114 F.2d 849, cert. denied 312 U.S. 680, 61 S.Ct. 449, 85 L.Ed. 1119.

Respondent's employees have likewise attempted to file four decertification petitions with the Board, but without success. It apparently is the Board's view or policy that its certification of September 2, 1964, does in fact extend forever without limitation and effectively bars any action by the respondent's present employees to seek decertification or any action by the employer seeking decertification.

4.

The Court in the Exercise of Its Equity Powers Should Not Issue a Mandatory Injunction Based on Data Over Five Years Old.

The argument is made in some of the cases that the employer has an adequate remedy in such a situation since he may petition the Court of Appeals for a review of an erroneous order.

"We do not think, however, that this is a complete answer. The Board is invoking the injunctive power of equity carrying with it the power to punish for contempt; and this ought not be exercised except in accordance with equitable principles. *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754. It is manifest that it should not be exercised when there has been such delay in applying for enforcement that the Board's order probably will not do justice at the time enforcement is applied for."

NLRB v. *Norfolk Shipbuilder & D. Corp.*, 172 F.2d 813.

The Court of Appeals did not discuss the obvious fact that as a result of its decision, the petitioner will be obligated to bargaining with a union based on events transpiring five years ago. This result can only be reached by reading into the Act a continuing breach of an obligation to bargain which tolls the six months time limitation relative to unfair labor practices contained in Title 29, U.S.C.A. §160(b). Accordingly,

> "Acceptance of the Board's position would mean that the statute of limitations would never run in cases of this kind. *We think petitioner's position represents the correct view of the matter.*"
>
> *Local Lodge No. 1424* v. *NLRB*, 362 U.S. 411, 80 S.Ct. 822, ... L.Ed.2d .....

5.

The Board Has Failed to Comply with the Administrative Procdure Act in the Conduct of These Proceedings.

The Court of Appeals' decision has the effect of upholding the Board's unpublished rule announced in *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785.

> "- - - Under the Board's decision in *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785, the Board had the right, because of respondent's failure to bargain during part of the first year, to extend the year for a period equivalent to that part of year in which the respondent had failed to bargain."
>
> *NLRB* v. *Commerce Company, et al.*, 328 F.2d 600;
> *NLRB* v. *Burnett Construction Co.*, 350 F.2d 57.

Under the Board's "policy" it refuses to entertain decertification petitions while an unfair labor practice proceeding is pending against an employer without reference to any statute of limitation.

The Board's *Mar-Jac Poultry* rule further is in conflict with the Board's rule announced in *United States Gypsum Company, et al.*, 157 NLRB No. 60, wherein it was held:

> "We therefore now hold that in petitioning the Board for an election to question the continued majority of a previously certified incumbent union an employer in addition to showing the union's claim for continued recognition must demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status since its certification. To the extent that Whitney's and similar cases conflict with this holding, they are hereby overruled."

The court has stated that an employer has the right to challenge a certified union's continued representative status in a separate Board proceeding, *NLRB* v. *Mexia Textile Mills*, 339 U.S. 563, 70 S.Ct. 826, 94 L.Ed. 1067. Such a right is indeed illusory if the Board is not obligated to grant a hearing nor articulate the reasons for its denial of a hearing. Further, if such Board action is not reviewable by any court, then Congressional intent in enacting the Labor-Management Relations Act of 1947 and the Administrative Procedure Act has been subverted by administrative action.

This court recently examined in detail the Board's practice of making rules in the course of adjudicatory proceedings.

> "The rule making provisions of the Administrative Procedure Act *may not be avoided* by the process of making rules in course of adjudicatory proceeding."
>
> *NLRB* v. *Wyman-Gordon Company*, ... U.S. ....., 89 S.Ct. 1426, ... L.Ed.2d .....

The Board has in effect applied its unpublished *Mar-Jac Poultry* rule in denying petitioner a hearing on its petition

for decertification. This was not an order made during the course of an adjudicatory proceeding because the petition was summarily dismissed without an adjudication.

> "- - - this is neither the first nor the most severe instance of Board action approximating contravention of the APA in this manner. It has been long and severely criticized, e.g. Peck, The Atrophied Rule Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961) 1 Davis Administrative Law, Sec. 6.13 (Supp. 1967) *with no apparent effect.*"
>
> *Wyman-Gordon Company* v. *NLRB*, 397 F.2d 394.

The court is urged to apply the rule in *Wyman-Gordon* to this proceeding so as to bring the Board, as an adjudicatory agency, back into the judicial system.

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAYNE H. RATNER
444 North Market
P.O. Box 306
Wichita, Kansas 67201
Attorney for Groendyke Transport, Inc.

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 27-CA-1670

GROENDYKE TRANSPORT, INC.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 961

Supplemental Decision

On June 9, 1964, the Regional Director for Region 27 of the National Labor Relations Board issued a Decision and Direction of Election in Case No. 27-RC-2613, finding appropriate a unit of all truckdrivers employed by the Employer at its Denver, Colorado, terminal. After an election was duly conducted on August 3, 1964, the Regional Director certified International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 961, as the exclusive bargaining representative in this unit. Thereafter, Respondent refused to bargain with the Union on the ground that the unit found to be appropriate was not in fact an appropriate unit, and on the further ground that the election conducted in the unit by mail ballot was not a secret election in conformity with National Labor Relations Board Rules and Regulations.

On May 12, 1965, Trial Examiner David F. Doyle issued his Decision in the above-entitled proceeding, finding that the Respondent, by refusing to bargain with the Union in this unit, had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended. On September 8, 1965, the National Labor Relations Board issued a De-

cision and Order, 154 NLRB 1040, adopting the findings of the Trial Examiner, and ordered Respondent to bargain, upon request, with the Union.[1] On January 20, 1967, the United States Court of Appeals for the Tenth Circuit issued a decision, in which it rejected Respondent's contention that the election conducted by mail ballot was not a secret election in conformity with the Rules and Regulations of the Board, but remanded the case to the Board for further consideration of the unit issue.[2]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

In remanding the case to the Board for further consideration of the unit issue, the Court stated that the 1951 Board decision was "distinctly relevant" to the unit issue in the present case. Thus, the Court noted that the Board had found no local managerial autonomy in the 1951 case, but had found local autonomy in the instant case. Relying on *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, the Court concluded that it was incumbent upon the Board to articulate the reasons for its apparently inconsistent findings in the two cases involving the same employer. We have accepted the Court's remand, and we have reconsidered our original decision in the instant case, the earlier decision in the underlying representation case, the 1951

1. Respondent sought to introduce into evidence the transcript of testimony in Case No. 16-RC-597, decided January 15, 1951, entitled *"In the Matter of Groendyke Transport, Inc. and General Drivers, Chauffeurs and Helpers Union 886, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL."* The Board adopted the Trial Examiner's rejection of the offer as "extremely remote", and the Trial Examiner's finding that there is "no new evidence" which would require a redefinition of the bargaining unit found appropriate by the Regional Director.

2. *N.L.R.B.* v. *Groendyke Transport, Inc.*, 372 F.2d 137 (C.A. 10).

representation case, and the entire record in these proceedings, and we find no reason to modify our unit holding in the instant case.

The approval of a single-terminal bargaining unit in the instant case is entirely consistent with the Board's 1951 decision, 92 NLRB 1332. In that case, the Board rejected a requested unit comprised of the drivers at three of Respondent's terminals. The Board noted there that the three terminals were widely separated geographically; that they did not correspond to any functional or administrative division of the Respondent's operation; that the employees involved worked under pay rates and working conditions which were identical with those of the employees at the Respondent's other terminals; and, that the Respondent's business required frequent interchange of employees between its various terminals.

The factors that militated against the three-terminal grouping which the Board found inappropriate in its previous decision are not present with respect to the single-terminal unit sought here. The single-terminal unit avoids the problem of wide geographical separation, and corresponds with the Respondent's only operational subdivision since there are no intermediate levels of authority between the terminal and the central office. The terminal manager is directly responsible to the central office at Enid, Oklahoma, and the record shows that he has substantial authority in hiring, assigning, and disciplining drivers and in controlling the day-to-day work of the drivers. While the employees involved in the Board's previous decision worked under standard system-wide pay rates, the record here shows that, in March 1964, the Denver drivers bargained for and obtained a wage readjustment applicable only to drivers based in Colorado. The

record also shows that, as far as the Denver drivers are concerned, the Respondent's business does not require the frequent interchange of employees with other terminals. In the previous 12 months, no drivers have been transferred from Denver because of business considerations.

In short, our approval of a single-terminal unit here—a unit that, as the analogue of the single plant, is presumptively appropriate for the purposes of collective bargaining (*Dixie Belle Mills, Inc.*, 139 NLRB 629, 631; *Frederickson Motor Express Corp.*, 121 NLRB 32)—is consistent with the Board's previous rejection of a three-terminal unit. Accordingly, we reaffirm the unit finding and our Decision and Order heretofore issued in this case.

Dated, Washington, D. C. April 28, 1967.

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
National Labor Relations Board

[Seal]

APPENDIX B

NATIONAL LABOR RELATIONS BOARD
Region 27
260 New Custom House
721 Nineteenth Street
Denver, Colorado 80202

December 26, 1968

Payne Ratner, Attorney
Ratner, Mattox, Ratner, Ratner & Barnes
444 North Market
Wichita, Kansas 67201

Re: Groendyke Transport, Inc.
Case No. 27-RM-281

Dear Mr. Ratner:

On December 24, we received from you and docketed a petition under the above case number. A copy of the petition is attached.

As you know, there is presently pending before the Circuit Court of Appeals for the Tenth Circuit a petition for enforcement of the Board's Order directing the employer to bargain with Teamsters, Local No. 961. Until the current proceeding is concluded the Board will not entertain a petition involving this unit of employees. Accordingly, I am hereby dismissing your petition.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the National Labor Relations Board, Washington, D. C. 20570. A copy of such appeal must be served upon each of the other parties to the proceeding, including the undersigned. This appeal must contain a

complete statement setting forth the facts and reasons upon which it is based. The appeal (8 copies) should be filed with the Board in Washington, D.C., 20570, by the close of business on January 8, 1969, except that the Board may, upon good cause shown, grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

Very truly yours,

s/ Francis Sperandeo
Francis Sperandeo
Acting Regional Director

Attachments
Certified Mail
Return Receipt Requested

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY 1969 TERM

NATIONAL LABOR RELATIONS, BOARD, Petitioner, vs. GROENDYKE TRANSPORT, INC., Respondent.	No. 8571
GROENDYKE TRANSPORT, INC., Petitioner, vs. NATIONAL LABOR RELATIONS, BOARD, Respondent.	No. 150-69 [Consolidated with No. 8571]

On Supplemental Petition for Enforcement of an Order of the National Labor Relations Board (No. 8571)

(Filed September 11, 1969)

Lynn D. Poole, Attorney, National Labor Relations Board (Arnold Ordman, General Counsel, Dominick L Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Glen M. Bendixsen, Michael F. Rosenblum, Attorneys, National Labor Relations Board, on the brief) Washington, D.C., for Petitioner in No. 8571 and for Respondent in No. 150-69.

Payne H. Ratner, Attorney, Wichita, Kansas, for Respondent in No. 8571 and for Petitioner in No. 150-69.

Before MURRAH, Chief Judge, PHILLIPS and HICKEY, United States Circuit Judges.

MURRAH, Chief Judge

This is a proceeding to enforce a typical cease and desist and bargain upon request order of the National Labor Relations Board. Respondent does not deny failure to bargain with the union but asserts as a defense that the designated bargaining unit is not appropriate.

When this case was here in 372 F.2d 137, cert. denied 387 U.S. 932, we upheld the validity of the representation election but remanded the case with directions to reconcile an apparent inconsistency of the Board in holding that a three terminal grouping was an inappropriate bargaining unit in 1951 and the instant finding that a single unit consisting of the Denver terminal employees of the same employer is now an appropriate bargaining unit. In the first enforcement proceeding, the Board did not attempt to distinguish the two situations or to reconcile the factual differences if any. We thought the integrity of the administrative process required it. And we were unwilling to accept counsel's attempted ad hoc rationalization.

Upon reconsideration of all the proceedings on the whole record, the Board found no reason to modify the unit holding in this case. In arriving at that decision, the Board was careful to point out that the factors which militated against the three terminal grouping found inappropriate in the previous case are not present in this single terminal unit. Specifically, the Board found that the single terminal unit avoids the wide geographic separation existing in the 1951 proceeding, the Denver terminal does not experience frequent interchange of employees with other

terminals, there is no system-wide scale for wages and the Denver terminal manager has substantial authority in matters of daily concern to the drivers.

These findings are supported by substantial evidence and afford a rational basis for distinguishing the two proceedings. The scope of our review as to the appropriateness of a bargaining unit has been met. And we sustain the Board's holding that a unit consisting of Groendyke's Denver drivers is appropriate.

Respondent pleads the six month statute of limitations. 29 U.S.C. Section 160(b). The argument runs like this: The Board's Supplemental Decision on remand was issued April 28, 1967. The duty to bargain commenced anew at that time. Enforcement was not sought for more than six months thereafter and is therefore barred. The contention is wholly without merit. Nothing more is involved than enforcement of a Board order after remand. And the six month limitation period has no application to a petition for enforcement.

Failing in the statutory limitations claim, respondent invokes the doctrine of laches. The obvious answer to this defense is that Groendyke could have sought review of the order. 29 U.S.C. Section 160(f). It did not have to wait for the Board to act to contest this matter. The procedure for review was readily available. And Groendyke is not in a position to complain because the Board did not seek immediate enforcement.

It is further contended that respondent should have been allowed to show that the union no longer has a majority among the drivers at the Denver terminal. We do not agree.

A Board conducted election established the drivers' choice of the union as their bargaining representative. And

Groendyke failed to bargain with that representative in violation of 29 U.S.C. Section 158(a)(5). As a remedial measure, the Board seeks to compel respondent to bargain with the union upon request.

In order to effectuate the policies of the Act, an employer may be ordered to bargain with a duly designated union without the necessity of a showing that the union has been able to maintain its majority status during the period of the employer's refusal to bargain. N.L.R.B. v. P. Lorillard Co., 314 U.S. 512. And cf. N.L.R.B. v. Gissel Packing Co, Inc., ... U.S. ..... To permit Groendyke to show the absence of a union majority would seriously impair the power of the Board to eradicate the effects of a refusal to bargain.

But the Order does not establish a permanent bargaining relationship. If, after the effects of the unfair labor practice have been dissipated by good faith bargaining, the employees wish to file a decertification petition, they may do so. Franks Bros. Co. v. N.L.R.B., 321 U.S. 702. The Order does no more than seek to create a climate for collective bargaining that would have existed in absence of Groendyke's unfair labor practice. And we cannot say that the chosen remedy is inappropriate for the effectuation of the statutory requirement for good faith bargaining.

Enforcement granted.

On Petition to Review and Set Aside an Order of the National Labor Relations Board (No. 150-69)

This is a proceeding to review a ruling by the National Labor Relations Board dismissing a 9(c) petition for election filed after the Board ordered the petitioner to bargain with the union pursuant to an election upheld in the first Groendyke case, N.L.R.B. v. Groendyke Transport, Inc., 372

F.2d 137 (10th Cir.). Cert. denied 387 U.S. 932. The dismissal was based on Board policy against entertaining a 9(c) petition while an unfair labor practice proceeding is pending against the employer. Groendyke asserts that this Board policy is contrary to the Administrative Procedures Act as construed in Wyman-Gordon v. N.L.R.B., ... U.S. ..... But respondent seeks to dismiss the appeal because the Board's action does not constitute a final order within the meaning of Section 10(f). The appeal is dismissed on that ground.

This court has firmly held that rulings on Section 9(c) proceedings are interlocutory in nature and not directly reviewable in the courts. N.L.R.B. v. Ideal Laundry & Dry Cleaning, 330 F.2d 712 (10th Cir.); Furr's Inc. v. N.L.R.B., 350 F.2d 84 (10th Cir.). And that the proper method of review is in a proceeding under Section 10(e) or (f). The challenge to the Board's policy can come to issue only after the petitioner has bargained in good faith in compliance with the order of the Board which we enforce in N.L.R.B. v. Groendyke Transport, Inc., decided on this consolidated appeal.

Motion to dismiss granted.

APPENDIX D

United States Court of Appeals

FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS, BOARD, Petitioner, v. GROENDYKE TRANSPORT, INC., Respondent.	No. 8571
GROENDYKE TRANSPORT, INC., Petitioner, v. NATIONAL LABOR RELATIONS, BOARD, Respondent.	No. 150-69

Judgment

Before: Murrah, Chief Judge, Phillips and Hickey, United States Circuit Court Judges.

THESE CAUSES, consolidated for the purposes of argument and decision, came on to be heard upon the application of the National Labor Relations Board for enforcement of its supplemental order of April 28, 1967, reaffirming its prior order of September 8, 1965, issued against Respondent, Groendyke Transport, Inc., its officers, agents, successors and assigns in Cause No. 8571; and in Cause No. 150-69, upon a petition to review and set aside an order of the National Labor Relations Board dismissing an election petition filed under Section 9(c)(B) of the Act on December 26, 1968, in Board Case No. 27-RM-281. The Court heard argument of respective counsel on July 10, 1969, and has considered the briefs and transcript of

record filed in these causes. On September 11, 1969, the Court being fully advised in the premises, handed down its opinion, granting enforcement of the Board's order in Cause No. 8571; and dismissing the petition to review in Cause No. 150-69.

ON CONSIDERATION WHEREOF, IT IS ORDERED AND ADJUDGED by the United States Court of Appeals for the Tenth Circuit that the said Order of the National Labor Relations Board in Cause No. 8571 be enforced, and that Respondent, Groendyke Transport, Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the petition to review in Cause No. 150-69 be and it is hereby dismissed.

/s/ Judge Murrah
Judge, United States Court of Appeals for the Tenth Circuit

DATED: October 13, 1969

APPENDIX E

TITLE 29, U.S.C.A., §158:

"(a) It shall be an unfair labor practice for an employer—

"- - - (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

APPENDIX F

TITLE 29, U.S.C.A. §159(a):

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment - - -."

APPENDIX G

TITLE 29, U.S.C.A. §159(c):

"(1) Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board - - -"

APPENDIX H

TITLE 29, U.S.C.A. §159(c)(B):

> "(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

APPENDIX I

TITLE 29, U.S.C.A. §160(b):

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less that five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, - - -"

APPENDIX J

TITLE 5, U.S.C.A. §552:

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public - - -

* * *

"(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

"(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

APPENDIX K

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Petition

1. Purpose of this Petition.

x. RD-Decertification

2. Name of Employer—Groendyke Transport, Inc.
Alvin L. Hamilton, Pres.,
Phone #AD4-4663

3. Address—P.O. Box 632, Enid, Oklahoma 73701.

4a. Type of Establishment: Trucking Industry

4b. Identify principal product or service: Transportation of Petroleum Products

5. Unit involved:

All truck drivers employed by Employer at its Denver, Colorado, terminal

Excluded: All other employees, guards, watchmen & supervisors as defined in the Act.

6a. Number of employees in unit: Present 13

6b. Is this petition supported by 30% or more of the employees in the unit?

Yes.

7. - - -

8. Certified Bargaining Agent
International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 961, Denver, Colorado, 3245 Eliot Street, Denver, Colorado.

9. Date of Expiration of current contract, if any: None.

10. - - -

11a. Is there a strike or picketing at the employer's establishment involved?

No.

11c. The employer has been picketed by or on behalf of, None.

12. Organizations or individuals other than petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5 above.

None

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Groendyke Transport, Inc.
By s/ Alvin L. Hamilton
Alvin L. Hamilton, President
P.O. Box 632, Enid, Okla. 73701
Phone # AD4-4663

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 150-69

GROENDYKE TRANSPORT, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and Set Aside an Order of the National Labor Relations Board

To the Honorable Judges of the United States Court of Appeals for the Tenth Circuit:

Groendyke Transport, Inc., hereinafter referred to as petitioner, believing itself to be aggrieved by a certain order issued on January 22, 1969, by the National Labor Relations Board, hereinafter referred to as the Board, in a proceeding filed by petitioner appearing upon the docket of the Board as Case No. 27-RM-281, In the Matter of Groendyke Transport, Inc., respectfully petitions this Honorable Court to review and set aside said order and, in support of its petition, respectfully represents to the Court as follows:

Parties and Jurisdiction

1.

Petitioner is and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of Oklahoma. Its general offices and principal place of business is located in Enid, Oklahoma. Petitioner is and at all times mentioned herein was engaged in the transportation of commodities in bulk as a common carrier by motor vehicle operating throughout all of the states of the United States of America pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission. Petitioner resides and transacts business in the State of Oklahoma within the Tenth Judicial Circuit of the United States.

2.

Respondent is an agency of the United States of America known as the National Labor Relations Board, created by the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C.A. §151-168, hereinafter referred to as the Act. Its principal office is in Washington, District of Columbia. The Board has a regional office in Denver, Colorado, and a regional director in charge thereof.

3.

The acts complained of in said proceeding before the Board are alleged to have occurred within the Tenth Judicial Circuit of the United States and within the jurisdiction of this Court.

4.

By reason of the matters alleged in paragraphs 1, 2 and 3 hereof, this Court has jurisdiction of the parties and the subject matter herein involved under §10(f) of the Act. Title 29, U.S.C.A. §160(f).

Proceedings Before the Board and Order to Be Reviewed

5.

On December 24, 1968, petitioner filed a petition pursuant to Title 29, U.S.C.A. §159(c)(B) alleging that a substantial number of petitioner's employees asserted that the certified bargaining representative, Teamsters Local No. 961, Denver, Colorado, was no longer their representative. This petition was supported by four exhibits demonstrating that a majority of the employees in the particular unit had attempted to file four previous decertification petitions but said petitions were summarily dismissed without a hearing.

6.

On January 22, 1969, petitioner's Petition for Decertification filed herein was summarily dismissed without a hearing.

7.

In dismissing petitioner's petition, the Board ruled in substance that the employer had no right to file such a petition as long as petitioner was currently contesting an enforcement order. No other reasons were given by the Board for dismissing petitioner's petition.

8.

A certified copy of the documents making up the record in this case is attached hereto.

9.

Petitioner is aggrieved by said order for the reasons hereinafter stated.

(a) Petitioner's rights under the due process clause of the Fourteenth Amendment of the Constitution of the United States have been denied.

(b) Petitioner's statutory rights under the National Labor Relations Act, Title 29. U.S.C.A. §159(c)(B), have been denied.

(c) Petitioner's rights under the Administrative Procedure Act, Title 5. U.S.C.A. §551, et seq. have been denied.

WHEREFORE, your petitioner, Groendyke Transport, Inc., prays the Honorable Court to cause notice of this petition to be served upon respondent and review the aforementioned order dated January 22, 1969. Petitioner respectfully prays that said order of the Board be set aside, vacated and that the Board be ordered to grant a hearing on petitioner's petition for decertification or take such action as the rights and equities of the case may require.

Groendyke Transport, Inc., Petitioner
By s/ Payne Ratner
Payne Ratner, Its Attorney

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 6 1970
JOHN F. DAVIS, CLERK

No. 1052

In the Supreme Court of the United States

OCTOBER TERM, 1969

GROENDYKE TRANSPORT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice, Washington, D.C. 20530

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MICHAEL F. ROSENBLUM,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1052

GROENDYKE TRANSPORT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A11) is reported at 417 F. 2d 33. Its earlier opinion is reported at 372 F. 2d 137, certiorari denied, 387 U.S. 932. The Board's supplemental decision and order (Pet. App. A1-A4) are reported at 164 NLRB 231. Its earlier decision and order are reported at 154 NLRB 1040.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1969 (Pet. App. A12-A13). The peti-

tion for a writ of certiorari was filed on January 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board abused its discretion to determine appropriate collective bargaining units by concluding that the Company's Denver terminal constituted an appropriate unit.

2. Whether, in the circumstances of this case, the Board properly ordered the company to bargain with the union which had been certified as the representative of the employees in that unit.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. A13-A16 of the Appendix to the petition.

STATEMENT

Groendyke Transport, Inc., operates a truck freight line for the transportation of petroleum products. Its home office is in Enid, Oklahoma, and it has 29 terminals located in Oklahoma, Texas, Kansas, New Mexico, and Colorado (A. 127-128; 23-25, 40-41).[1] The two terminals in Colorado are at Denver and La-

[1] "A." references are to the Appendix to the briefs filed in the court below.

Junta, approximately 180 miles apart; no other terminal is within 400 miles of Denver (A. 40-41). Seventeen drivers are stationed at Denver and 2 are stationed at LaJunta (A. 127-128, 96-97).[2] The basic issue in this case is whether the Denver terminal, alone, constitutes an appropriate bargaining unit, and the pertinent facts are as follows:

The Company's accounting, billing, payroll, and record-keeping are handled centrally by the home office at Enid (A. 24-27, 28). However, responsibility for the day-to-day operation of the Denver terminal rests with the terminal manager, Jesse Seals (A. 119-120). The Denver terminal manager has authority to assign drivers to various trucks and hauls, and can alter these assignments whenever necessary (A. 109). The manager reprimands drivers when complaints are received from customers and investigates accidents involving any of the Denver drivers (A. 113, 119-121). Although there is a special grievance committee at the home office, grievances and "gripes" are heard initially by the terminal manager (A. 34, 86, 113, 118, 124-125).[3] Matters such as shortages in pay are handled at the local level (A. 119, 124-125). The terminal manager also has authority to grant requests for time off (A. 113).

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[2] Except for the arranging of return hauls between Denver and LaJunta, the LaJunta drivers receive orders directly from customers and dispatch themselves without contacting the Denver terminal (A. 58, 107-109).

[3] The only type of grievance which the Denver terminal manager could recall having been handled by the committee involved monetary discipline against an employee (A. 118-119).

After an initial order is assigned to a particular terminal by the home office, any subsequent orders may be placed directly with the local terminal (A. 49-50, 57, 60-61).

Although the Company's home office is ultimately responsible for the hiring of drivers, Denver terminal personnel interview the applicants, choose the physicians or clinics to use for physical examinations, and ride with each applicant to test his driving ability (A. 27-28, 75-76, 79-80, 89-90, 106-107, 118). Although it usually takes two or three weeks for the home office to pass on an application, new drivers are normally put to work by the terminal manager within three or four days after their initial interview (A. 75-76, 79-80, 89-90, 106-107, 111, 118).

Only 2 of the 17 drivers at the Denver terminal have transferred there from other terminals (A. 100-102). In the 12 months prior to the Board hearing, only 2 drivers had transferred out of the Denver terminal and these transfers were pursuant to personal requests and were not the result of business fluctuations (A. 100-102).

The Company has no history of formal collective bargaining, either on a system-wide or single-terminal basis (A. 41-42). However, in March 1964, the Denver drivers requested a meeting with the Company's president, which resulted in an adjustment in wages applicable only to drivers stationed in Colorado (A. 151-153, 117, 122-123). No labor organization has sought to represent the Denver drivers on a basis broader than the single terminal (A. 128, 118).

Shortly after the March, 1964 meeting, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 961, filed a petition with the Board for a representation election among the Denver drivers. On the basis of the above facts, the Board's Regional Director found that the Denver terminal constituted an appropriate unit for collective bargaining and directed an election in that unit (A. 127-130). In an election on August 3, 1964, 14 votes were cast for the Union and 2 were cast against it. The Company's objections to the election were overruled by the Regional Director, who certified the Union as the employees' representative; the Board declined to review that action (A. 136-137, 140). Thereafter, the Company refused to bargain, the Union filed unfair labor practice charges, and the Board found that the Company had violated Section 8(a)(5) and (1) of the Act (A. 7; 16-17). The Board ordered the Company to cease and desist from the unfair labor practice found, and to bargain with the Union upon request (A. 11-14).

Upon the Board's petition for enforcement of its order, the court below concluded that the election had been properly conducted, but remanded the unit question to the Board to explain a possible discrepancy between its decision in this case and an earlier decision involving the same company (92 NLRB 1332) which found a three-terminal unit to be inappropriate. *National Labor Relations Board* v. *Groendyke Transport, Inc.*, 372 F. 2d 137 (C.A. 10), certiorari denied, 387 U.S. 932. The Board reviewed its earlier decision and pointed out that the factors which

militated against a three-terminal unit—wide geographic separation between them and the fact that the three terminals did not correspond to any functional or administrative division of the Company's operation—were absent in the case of this single-terminal unit. Accordingly, it reaffirmed the appropriateness of its unit determination in this case. (Pet. App. A1-A4.) On November 18, 1968, it again requested the court below to enforce its bargaining order.

The Company then filed a petition with the Regional Director, seeking an election to decertify the Union (Pet. App. A16-A18). The petition was dismissed by the Director because of the outstanding Board bargaining order, with which the Company had failed to comply (Pet. App. A5-A6), and the Company sought review.

The two actions were consolidated in the court of appeals. The court enforced the Board's order, and dismissed the Company's petition (Pet. App. A7-A11).

ARGUMENT

1. Section 9(b) of the Act empowers the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof." In exercising this authority, the Board determined that the Company's terminal at Denver, Colorado, was an appropriate unit for collective bargaining. Whether that conclusion, which was sus-

tained by the court below, constitutes a reasonable exercise of the Board's discretion principally involves an assessment of particular facts, and thus does not warrant futher review.

In any event, the geographic separation of the Denver terminal from petitioner's other terminals, the substantial authority of the Denver terminal manager, the minimal interchange of drivers to and from other terminals, and the previous separate treatment of the Denver drivers (*supra*, pp. 2-4), all support the Board's determination that the Denver terminal constitutes an appropriate bargaining unit. Furthermore, the Board properly concluded that the absence of these factors in connection with the three-terminal unit found to be inappropriate in 1951 (*supra*, pp. 5-6) amply distinguished that case from the present one.[4]

2. The Board correctly rejected the Company's offer to show that the Union no longer represented a

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[4] The cases cited by the Company (Pet. 11-13) are also distinguishable. *National Labor Relations Board* v. *Davis Cafeteria, Inc.*, 396 F. 2d 18 (C.A. 5), *National Labor Relations Board* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (C.A. 1), certiorari denied, 389 U.S. 959, and *National Labor Relations Board* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (C.A. 7), involved the propriety of single store units within a geographically cohesive chain, in which the courts found no real local autonomy and a frequent interchange of employees. In *Local 1325, Retail Clerks* v. *National Labor Relations Board*, 414 F. 2d 1194 (C.A.D.C.) (Pet. 7), the District of Columbia Circuit held that while a single store unit, among others, might have been justified, it could not accept the Board's conclusion that a state-wide unit was appropriate in that case, since it resulted in including "a 'distant' Rhode Island store and exclud[ing] a 'nearby' Massachusetts store" (414 F. 2d at 1205).

majority of the employees at the Denver terminal. A loss of majority does not preclude enforcement of the Board's bargaining order where the loss is fairly attributable to the Company's unlawful refusal to honor the Board's certification of the Union. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 610; *Franks Bros.* v. *National Labor Relations Board*, 321 U.S. 702. Nor does enforcement of the Board's order run afoul of Section 10(b) of the Act. That provision (Pet. App. A15) merely bars issuance of a *complaint* based "upon any unfair labor practices occurring more than six months prior to the filing of the charge with the Board"; the charges here were filed on September 14, 1964, within one month of the Company's initial refusal to bargain with the Union (A5, 11). See *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, n. 16.

3. Finally, the Company's attack on *Mar-Jac Poultry Co.*, 136 NLRB 785 (Pet. 18-20) is misplaced. There, the Board held that, where an employer deprives a certified bargaining representative of the benefits of a substantial portion of the certification year (see *Brooks* v. *National Labor Relations Board*, 348 U.S. 96) by delaying the start of good faith bargaining, he may be required to bargain with the union beyond expiration of that year in order to provide the union with a full twelve months in which to seek agreement on a contract.[5] Since the

[5] The *Mar-Jac* principle has received judicial approval. *National Labor Relations Board* v. *Commerce Co.*, 328 F. 2d 600, 601 (C.A. 5), certiorari denied, 379 U.S. 817; *National Labor Relations Board* v. *Burnett Construction Co.*, 350 F. 2d 57, 60 (C.A. 10).

Company has not as yet started to bargain in good faith with the Union, the Regional Director dismissed its petition to decertify the Union, not on the basis of *Mar-Jac*, but under the well settled principle that such a petition will not be processed in the face of unremedied unfair labor practices. See *Furr's, Inc.* v. *National Labor Relations Board*, 350 F. 2d 84, 85-86 (C.A. 10); *National Labor Relations Board* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 307-308 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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